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# SUBMISSION

## BY THE

## ONTARIO FEDERATION OF LABOUR

## TO

## THE STANDING COMMITTEE ON RESOURCES DEVELOPMENT

## ON

## BILL 40

## *AN ACT TO AMEND CERTAIN ACTS CONCERNING COLLECTIVE BARGAINING AND EMPLOYMENT*

## AUGUST 5, 1992

SUBMISSION

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## TABLE OF CONTENTS


**INTRODUCTION** ..... 1

**I. PURPOSE CLAUSE** ..... 8

**2. THE RIGHT TO ORGANIZE** ..... 9
- a) Domestics ..... 10
- b) Hunters and Trappers ..... 10
- c) Agricultural, Horticultural and Silvicultural Workers ..... 11
- d) Professionals ..... 12
- e) Security Guards ..... 13
- f) Issues Outstanding ..... 13

**3. ORGANIZING AND CERTIFICATION** ..... 14
- a) Protection of Employees from Unfair Labour Practices During Organizing Campaigns ..... 15
- b) Access to Third-Party Property ..... 17
- c) Membership Fee Eliminated ..... 18
- d) Support Required for Certification ..... 19
- e) Access to Lists of Employees for Organizing .. 20
- f) Petitions and Revocations ..... 21
- g) Unfair Labour Practice Certification ..... 23

**4. STRUCTURE AND CONFIGURATION OF BARGAINING UNITS** ..... 24
- a) Part-time Employees and Appropriate Bargaining Units ..... 24
- b) Consolidation of Bargaining Units ..... 25

**5. FIRST AGREEMENT ARBITRATION** ..... 27

6. **IMPROVING COLLECTIVE BARGAINING AND REDUCING INDUSTRIAL CONFLICT** . . . . . **29**
a) Use of Scabs . . . . . 29
b) Right to Return to Work . . . . . 37
c) Employee Benefits Continuation . . . . . 38
d) Definition of a Strike . . . . . 39

7. **THE GRIEVANCE ARBITRATION PROCESS** . . . . . **41**
a) Deemed Arbitration Clause, Settlement Officers and Time Limits . . . . . 41
b) Just Cause . . . . . 42
c) Jurisdiction and Procedure . . . . . 42
d) Administration . . . . . 45

8. **PRESERVATION OF BARGAINING RIGHTS** . . . . . **45**
a) Successor Rights -- Sale of a Business . . . . . 45
b) Federal to Provincial Sale . . . . . 48
c) Contracting-In and Contract Tendering in the Contract Service Sector . . . . . 49

9. **ADJUSTMENT AND CHANGE IN THE WORKPLACE** . . . . **51**

**CONCLUSION** . . . . . **54**

## INTRODUCTION

The Ontario Federation of Labour is pleased to have the opportunity to present our views on Bill 40, the government's proposed amendments to the Ontario Labour Relations Act, to the members of the Ontario Legislature's Resources Development Committee.

The Ontario Federation of Labour is comprised of affiliate unions representing 800,000 members, who are engaged in many and varied occupations and who live in virtually every community in our province. The Federation has represented the interests of Ontario workers, both organized and unorganized, since 1957. Prior to the 1957 merger, our predecessor organizations represented the interests of workers in this province for almost 100 years.

We are not newcomers to the subject of workers' rights and the struggle to obtain those rights. On the subject at hand, we have made submissions advocating reform since October 1959. We have advocated for, not only the reforms contained in Bill 40, but many others as well. Some have been acted upon by previous provincial governments.

Our credentials for addressing the issue of workers' rights are well established in our province. We believe that the issue of Bill 40 is clearly an issue of workers' rights. In the simplest of terms, the proposed legislation outlines the manner in which workers will be treated in a modern economy and in the context of a democratic society.

In the course of these hearings, this committee will entertain submissions of indignant protest and hear expressions of outrage from ***some*** members of the business community. These representations will argue that there has not been sufficient consultation on the subject of Labour Law Reform. In our experience of over a century of representing workers, we cannot recall another proposed legislative initiative which has been discussed as thoroughly as Bill 40. An exception perhaps is the national debate on the Canada/U.S. Free Trade Agreement. The degree to which business has conducted its campaign in opposition to these amendments, within government and publicly, is unprecedented in Ontario. A slick and expensive American style "Hill and Knowlton" campaign of fearmongering and misinformation has been visited upon the citizens of Ontario. And for what purpose? For the single purpose of protecting and advancing the vested interests of the business community.

Some business spokespersons have attempted to advance the theory that this legislation's sole purpose is to advance the interests of Ontario's unions. I respectfully remind this committee of the obvious: ***unions don't join unions, workers join unions***. Workers who believe they are treated unfairly by their employer and believe they cannot, as individuals, obtain relief, join with other workers to seek representation. This legislation stipulates that it must be a majority of workers who feel they require relief through representation prior to an alteration of the status quo. When a majority of workers feel relief is necessary they must, in a democratic society, be granted the same right as employers to join together in their pursuit of their common interests.

We would ask those who oppose Bill 40 why they believe it is all right for people to combine their resources as shareholders to improve their mutual well-being and security, yet not all right for workers who wish to exercise that same democratic right. Why is it that workers who combine their resources as union members to improve their mutual well-being and security are characterized as hurting Ontario's future?

Why is it that employer organizations such as the Canadian Manufacturers Association, Canadian Federation of Independent Business, Business Council on National Issues and a myriad of other trade and commercial

employer organizations exist to advance their common interests without interference, intimidation or punitive action and yet protest vigorously against granting the same basic democratic right of association to workers? Surely the members of this committee must recognize the inconsistency, if not the clear hypocrisy, of a business representative opposing Bill 40 while, at the same time, exercising the very same rights of collective association.

For over a year now, voices within Ontario's business sectors have engaged in a campaign to dissuade foreign investment from locating in Ontario. We have been astonished by the number of reputable employers who have been caught up in the hysterics. Billboard slogans, reminiscent of political editorial cartoons found in Ontario around 1943 to 45, are an insult to the intelligence of our citizens and reveal a mentality inconsistent with Ontario's well-being. Unfortunately, these slogans and attitudes have been parroted by some members of the Legislature. Suggestions that Ontario is an anti-business province because of legislation already commonplace in the world's strongest and most productive economies, designed to recognize that workers are entitled to relief from employer abuse, are hardly pro-Ontario. These negative messages cast doubts upon the abilities and productive capacity of Ontario's hard-working men and women.

No doubt these voices also subscribe to a business opinion which appeared in the Toronto Sun, June 5 of this year, an excerpt of which I will quote; ***"What the socialists in power at Queen's Park don't seem to realize is that labour is a commodity, like a can of beer, an automobile or a refrigerator"***. The workers of this province, we can assure you, do not see themselves as inanimate, senseless, unintelligent, unthinking commodities. It would appear by the proposals contained in Bill 40, that the provincial government's view of workers and their value to society -- their worth and their dignity -- is much more humane than the brutal view expressed by the Toronto Sun. We trust the opposition parties in the Legislature will distance themselves from this disparaging attitude toward workers and support the advancement of workers' rights proposed in the legislation before us.

We ask the members of this committee to focus on the fundamental issue before you -- granting relief to countless thousands of Ontario workers who suffer abuse at the hands of their employers. We want to be clear. We do not think that all employers are the same in their treatment of their employees. Ontario has many employers who treat their workers fairly and with respect. However, the reality is that many employers act in a punitive and negligent manner and do abuse their workers. The records of the Ontario Labour Relations Board, Ministry of Labour, Workers' Compensation Board and the Ontario Human Rights Commission, show that thousands of

this province's workers have suffered sexual harassment, injury and death as a result of employer negligence. Many have been cheated out of statutory benefits, disciplined and discharged without cause, forced to work without statutory compensation and even threatened with deportation. We believe many other cases never see the light of day because of the worker's fear of reprisal by their employer. Most often, these cases are to be found in non-union workplaces. We find it difficult to understand why business is fighting so hard to protect abusive employers and maintain an environment which will guarantee continued abuse of defenceless workers.

In this short introduction, we wish, as well, to ask members of the committee to keep in mind that business opposition to the advancement of workers' rights is not new, although the level of the current volume is somewhat surprising. Employers have, as a matter of historical record, opposed among other public policy measures: the Factory Act of 1884 prohibiting the use of child labour and establishing minimum workplace rules; suffrage and the extension of a right to vote to women; reductions in the work week of 60, 54 and 48 hours to the present 40 hours; the removal from criminal law of the provision of engaging in a conspiracy if a worker joined a trade union; the Workmen's Compensation Act of 1915; the Health and Safety Acts, Bills 79 and 208; public education; Canada Pension Plan; and, of late, Pay Equity and Bill 40 to name a few.

Employers have supported public policy measures, such as wage controls, Canada/U.S. Free Trade Agreement, unemployment insurance cutbacks, pension clawbacks and reduced social expenditures. On the other hand, enabling the most vulnerable in Ontario's workforce to gain fairness and equity has been met with opposition from most employers. Either through support or opposition to public policy initiatives, the pattern has been consistent. Any measure designed to help workers has been opposed by business spokespersons.

As you have now gathered, the Ontario Federation of Labour is particularly interested in the amendments contained in Bill 40, not from any narrow self serving perspective, but from the perspective of **fairness** and **equity** for all working people. This is why we support the legislative initiatives in the areas of pay equity and employment equity, and this is why we support the labour law reforms contained in Bill 40.

We believe that more needs to be done for those working people in Ontario who need help the most -- women, visible minorities and youth -- who are increasingly employed in the poorly paid small workplace sector. We, therefore, would particularly like to draw to the attention of the members of the committee that part of our submission that speaks to the issue of broader-based bargaining.

The remainder of our presentation is contained within the following pages of this brief. For the convenience of this committee we have indicated as best we can which amendments we support and why we support them, and where, in our opinion, the proposals are either incomplete or, as yet, inadequate. We are ready to respond to any questions on the foregoing remarks or the content of our submission.

## I. PURPOSE CLAUSE

Section 5 of the amendments set out in Bill 40 contains a proposed Purpose Clause. At present, there is no Purpose Clause in the Ontario Labour Relations Act (the Act). There is merely a Preamble which outlines the reason for the Act's existence.

The new Purpose Clause is designed to assist the Ontario Labour Relations Board (the Board) in interpreting the Act. While currently the Board or the Courts have considered the Preamble when conducting a judicial review of a Board decision, in most instances little emphasis is placed on the Preamble.

The concern the Ontario Federation of Labour has with this clause has been to upgrade it from a Preamble and make it an integral part of the Act and to strengthen its wording as much as possible. Our purpose in doing so is that, by including a strong Purpose Clause in the Act, adjudicators will be required to advance such purposes in their rulings. In short, decisions will be required to be consistent with the Act's new Purpose Section.

We are, therefore, pleased that Bill 40, consistent with the Ministry of Labour's (MOL's) earlier Discussion Paper, includes a Purpose Clause. The objectives set out, however, are still not as clear nor as strong as they could be. Indeed, far from taking up our earlier suggestion that a further objective be to "recognize that effective trade union representation is necessary to advance equality between employees and employers", the new language is further diluted.

So, while the new Purpose Clause represents an improvement over the current Act's Preamble, there remains space for considerable improvement.

## 2. THE RIGHT TO ORGANIZE

The right to organize has been extended to a number of groups currently excluded. We can only view this as a positive development.

Specifically, the proposed amendments will remove the exclusions of domestics, agricultural, horticultural and silvicultural workers, hunters and trappers, and professionals. We will discuss each of these in turn.

a) Domestics -- While the scope of the Act is to be amended to include domestics, this will prove a hollow victory for such workers unless mechanisms are put in place so that they can bargain. Most domestics are employed in separate workplaces, by separate employers, and their job security is often tenuous.

Organizational structures need to be developed whereby domestics can be represented, as can employers, and negotiate for their particular interests. In addition, Section 6(1) of the Act, which requires that there be more than one employee at a workplace before employees can organize, needs to be amended.

b) Hunters and Trappers -- The archaic exclusion regarding these employees is also to be removed. This may also prove illusory given that the number of employees in this area has dramatically declined in recent years and the need for further procedural changes to facilitate organizing.

c) Agricultural, Horticultural and Silvicultural Workers -- We support the proposals bringing Ontario's agricultural workers into line with those of all the other provinces, except Alberta, which allow either all such workers to organize or those in workplaces with a specified minimum number of employees.

There was considerable resistance from agricultural employers to the original proposal to include agricultural workers in the Act. The proposed amendment allows agricultural workers to organize, but represents a partial withdrawal from the original proposals.

The Task Force on Agricultural Labour Relations was established to recommend which agricultural workers should be allowed to organize and in what manner. The major recommendation of the Task Force is that separate legislation for the organization of agricultural and horticultural workers should be drafted and that strikes should be prohibited. Similar legislation already exists for other groups of workers such as firefighters, police and hospitals. It could be argued, however, that the vast majority of workers engaged in agriculture are not essential to the public security in the same manner.

Given that discussions between the parties and the government on the issues of separate legislation, inclusion in the Act versus regulation, and various dispute resolution mechanisms are ongoing, we will limit our comments and support the position of the unions in this jurisdiction.

d) Professionals -- The current exclusion of the named professional employees is long outdated. We support the proposals to include them. Many other professionals, such as schoolteachers, engineers and professors have long enjoyed collective bargaining rights as have professionals in other provinces.

Professionals may well have distinct concerns which stem from their professions and set them apart from other employees. Consequently, the Board will place them in a separate bargaining unit. The legislative amendments do allow, upon an indication of support from the majority of professionals that they want to be a part of a broader bargaining unit, for them to do so. This choice is important. Larger bargaining units composed of other employees or units

combining professional employees (subsection 6(4.2)) can promote bargaining strength.

e) Security Guards -- We are of the view that Security Guards should be able to join the union of their choice. Ontario has been the only province which provides that security guards cannot freely choose which union will represent them. In these other jurisdictions, there have been no issues concerning conflict of interest. The proposed amendments speak to the issue of conflicting interests between a security guard's duty to their employer and their loyalty to other employees. Therefore, where a security guard's function includes the monitoring of other employees, she/he may be determined by the Board to be certified in a separate bargaining unit.

f) Issues Outstanding -- The proposed amendments still maintain a number of exclusions, the most notable of which are supervisory employees. We have long advocated that such employees should be allowed to organize, should they so chose, and that separate bargaining units would resolve any conflict of interest concerns.

We do not understand the criticism of the business community and the opposition parties to this proposal. No one is being coerced into unionizing. The issue is whether or not line supervisors have equal rights with all other working people or are to be deprived of the right to choose whether to act in concert in relation to their employer. Our view is that they should have the choice. How many, or indeed, if any, supervisors exercise this option is another matter.

Further, it is our view that such exclusions from the Act are inconsistent with the purpose of the Act, and may well conflict with Section 3 which holds that everyone is free to join a union. Such exclusions may also be found contrary to the guarantee of equal benefit of the law of Section 15 of the Canadian Chart of Rights and Freedoms.

## 3. ORGANIZING AND CERTIFICATION

This section represents the government's response to the substantial hurdles faced by employees when they attempt to obtain trade union representation.

a) Protection of Employees from Unfair Labour Practices During Organizing Campaigns -- We are on record as recommending that the Act be amended such that where an employer has knowledge of an organizing campaign, he/she must obtain leave of the Board before disciplining, discharging or removing any employee from the prospective bargaining unit.

The union should also be able to go to the Board for purposes of applying for an interim order of reinstatement. Such an order could be made within 48 hours of the union providing evidence of an organizing campaign and establishing that the grievor is an employee.

Our thinking in this matter was influenced by our hard experience. In our view, similar to employers who already have an expedited process for resolving complaints of illegal strikes, employees need an expedited process for the resolution of complaints that employers are interfering with the ability of employees to achieve collective bargaining rights. Speed is an essential element of the decision by workers to put themselves at risk to employer reprisal through a decision to unionize.

The proposed amendment (Section 92.2) will allow unions to request an expedited hearing where it files an unfair labour practice complaint under Section 91 of the Act, alleging that an employee was disciplined, terminated or "otherwise penalized" during "organizing activities". Where a union requests an expedited hearing under this section, the hearing must commence within fifteen days of the request and must sit on consecutive days (Monday to Thursday) until the hearing is complete. Thereafter, the Board must render its decision, oral or written, within 48 hours of the hearing's completion (Section 92.2(3) and (4)).

While this amendment significantly varies from what the trade union movement recommended, indeed it is a retrenchment from the MOL's own Discussion Paper of November 1991, which suggested a **7 day** waiting period as opposed to the now proposed 15 days. It is, nevertheless, a step forward. In large part, its significance rests in its ability to deter employers from committing unfair labour practices during the course of an organizing campaign. We can only hope that the provision is strong enough to deter anti-union employers

from deliberately discharging pro-union employees as a means of thwarting a union's organizing drive.

b) Access to Third-Party Property -- We support the amendment (Section 11.1(2)) that provides employees and union representatives the right to be, for purposes of organizing, on the premises "to which the public normally has access and from which a person occupying the premises would have a right to remove individuals". This means, union organizing activity can now take place on all private property to which the public has regular access, such as shopping malls and industrial parks.

This new right of access will take precedence over the right of owners to expel "trespassers" (Section 11.1(7)), but is subject to certain limitations. For example, union organizers may not go on to the employees' workplace. Efforts "to persuade employees to join a trade union" may occur only "at or near but outside entrances and exits to the employees' workplace". The Board can also limit the right of access further "as it considers appropriate in order to prevent the undue disruption of operation of the applicant" (Section

11.1(5)). What exactly constitutes "undue disruption" is left unspecified.

Given these two limitations and others, it remains unclear whether this amendment gives union organizers substantially greater access to private property to which the public has regular access. Dependant upon the Board's interpretation of what constitutes an "undue disruption of operations", the amendment could extend the right to greater access.

Our position remains, namely that union representatives should have the express right to access to specific parts of an employer's actual premises where no production is taking place, i.e. parking lots, cafeterias, etc.

c) Membership Fee Eliminated -- The one dollar membership fee will no longer have to be paid by an employee in order to become a "member" for purposes of certification. While this may make it marginally easier for unions to convince workers to become trade union members, its main effect will be to make it easier to establish union membership before the Board. We support this proposal as it eliminates one of the

objections an employer might use to delay and frustrate a certification application.

d) Support Required for Certification -- The amendments propose that the amount of membership support a union must have before it is entitled to automatic certification will remain at 55 percent (Section 8(2)). The amount required for entitlement to a representation vote on an application for certification is lowered to 40 percent.

In earlier presentations and written briefs, the trade union movement recommended that automatic certification be reduced to a simple majority and a representation vote to 35 percent. Such a proposal is not out of line with other jurisdictions, such as that of the Federal Government and such provinces as Newfoundland and Quebec. In Saskatchewan, the Board can hold a vote where as few as 25 percent of employees are shown to be members.

In their April 1991 report to arbitrator Kevin Burkett, the labour representatives of the Labour Law Reform Committee recommended that the Board hold a representational vote

where between 35 and 50 percent of employees were members of the union. Indeed, the MOL's own Discussion Paper (November 1991) recommended a vote be held where between 40 and 50 percent of employees were members. For some inexplicable reason, the government has now backed off this position and is maintaining the current Act's provision of 55 percent for automatic certification. This is a position we cannot support.

We can support the lowering of the percentage needed for a vote from 45 percent to 40 percent.

At the same time, we cannot help but note that in no other election of a representative in our society is it necessary for the candidate to obtain 40 percent of the eligible voters on a nomination paper in order to be guaranteed the right to appear on the ballot.

e) Access to Lists of Employees for Organizing -- This government has not seen fit to make amendments in this area. This is a significant omission. The government had the chance to open up and legitimate union organizing --

particularly amongst part-time employees -- but it has failed to do so. The labour representatives at the Labour Law Reform Committee recommended that "an obligation be inserted in the Act requiring an employer, upon an application for certification, to immediately forward to the trade union, a copy of the list which must be provided to the Board". In our view, this recommendation was not only fair and reasonable, but also consistent with the right of freedom of association under the Charter. We would ask that the government re-visit this important issue.

f) Petitions and Revocations -- The amendments (Section 8(4) to (6)) place a key limitation on the evidence that a Board may consider in certification applications. The Board will now not consider evidence if such evidence "is filed or presented after the certification application date". The main effect of this proposal will be to prevent the Board from considering post-application petitions from employees who claim they do not want to be represented by a union, where such petitions are filed after the union's application for certification. Restricting the role of post-application anti-union petitions in certification applications is a welcome and major step forward.

The MOL's Discussion Paper (November 1991) noted that 20 percent of certification applications involve petitions and that "an overwhelming majority of petitions are rejected by the Board" (p.21). Nonetheless, the Discussion Paper continues, "the time and expense required to oppose a petition results in substantial delay to the certification process, prolongs litigation, frustration for employees seeking to organize and damage to newly created and often fragile bargaining relationships". If such is the case, and we concur that it is, why not also explicitly eliminate pre-application revocation petitions. Once a worker has signed a membership card, there should be no further scrutiny by the Board, except in rare cases for fraud and forgery. It is our view that, if a worker wants to decertify, she/he can do so currently under the Act by applying to the Board in the months just prior to the termination of their collective agreement (Section 57).

We therefore ask the government to take the necessary further step and **eliminate pre-application revocation petitions .** To do otherwise runs the risk of turning the post-application petition problem, which these amendments try to

cure, into a **new pre-application revocation petition problem.**

g) Unfair Labour Practice Certification -- The Act currently provides that the Board has the authority to certify a union where the employer has committed an unfair labour practice. Two prerequisites must be met before the Board can exercise its authority. One of these prerequisites is being eliminated. It will no longer be necessary for a union to establish that it has achieved "membership support adequate for the purposes of collective bargaining" before being certified. The purpose of this change is to deter an employer who acts early enough in the process to avoid the current unfair labour practice provisions. This will go a long way in restricting blatant anti-union acts by an employer during an organizing campaign.

The Board now only needs to be satisfied that the true wishes of the employees are not likely to be ascertained given the employer's unfair labour practice, such as discharge of union organizers or members, the suspension, surveillance or interrogation of employees for union activity, threats of layoffs or contracting out of work to avoid certification, etc.

## 4. STRUCTURE AND CONFIGURATION OF BARGAINING UNITS

a) Part-time Employees and Appropriate Bargaining Units -- The Ontario Federation of Labour welcomes the amendments to Section 6 of the Act which directs the Board to find that a **single union of full-time and part-time employees** "shall be deemed by the Board to be a unit of employees appropriate for collective bargaining" (Section 6(2.1) and 6(2.2)). To combine these two groups of employees, it will be necessary that a minimum of 55 percent of the combined groups of employees be members of the union. Where the union has less than 55 percent support, separate full-time and part-time units will be required.

These amendments will help unions address the low rate of unionization among part-time employees -- a considerable proportion of which are women and visible minorities. Now the addition of part-time employees can help strengthen a single bargaining unit, rather than create another weak one. At the same time, the combining of bargaining units can facilitate the efforts of the increasing number of part-time

employees to improve their benefit and compensation levels as well as their job security.

b) Consolidation of Bargaining Units -- As the earlier submission by the Ontario Federation of Labour (February 6, 1992) in response to the MOL's Discussion Paper stated: "this is an area of fundamental importance to the trade union movement .....". It enables trade union bargaining unit structures to begin to evolve and adapt to the changes brought about by economic restructuring.

The amendments enable the Board to **combine two or more bargaining units of employees of the same employer into a single bargaining unit where all the employees are represented by the same trade union.** This provision is permissive (may) **not mandatory** (shall). The Board is required to consider such factors as the facilitation of viable and stable collective bargaining, the reduction of fragmentation of bargaining units and whether combining bargaining units would "cause serious labour relations problems".

In short, while we can envision many circumstances wherein bargaining unit consolidation would be positive, the effect of this amendment largely depends on how the Board interprets it. The amendments allow the Board to consolidate bargaining units and give it some direction as to the factors to consider, but the Board is not required to combine bargaining units.

The amendments are particularly **weak** where they speak to the consolidation of units at different locations. Here the Board is directed not to combine units of two or more geographic locations where it will "interfere unduly with the employer's ability to continue significantly different methods of operation or production at each of the places" (Section 7(4)). This leads us to a further point, namely, that the notion of "different methods of operation or production" could be the basis of considerable litigation resulting in both considerable delay and expense by the parties. The impact of this language may be of particular concern to the very sectors the amendment is aimed at -- the retail and service sector.

We would urge that such language be strengthened and that the whole section on the combining of bargaining units be revisited with the objective of being more clear and directive rather than permissive and vague.

## 5. FIRST AGREEMENT ARBITRATION

The amendments proposed in Bill 40 would establish a second method of obtaining first agreement arbitration. Currently, the only avenue for obtaining first agreement arbitration is by making an application to the Board after a "no-board" report has been issued. The amendments allow either party to make a request to the Minister of Labour for first agreement arbitration if no collective agreement has been entered into, and provided that 30 days have elapsed since the day the parties were in a legal strike or lockout position.

The intent of establishing a second procedure for establishing first agreement arbitration is to eliminate frustrating delay, high costs and lengthy Board proceedings, but the amendment falls short of this objective. A union must risk a minimum of 30 days of economic confrontation in the form of a strike or lockout before applying for first agreement arbitration.

Admittedly, 30 days is less than the average length of time under the existing procedureto contract out but it falls far short of what is necessary. On numerous occasions the Ontario Federation of Labour has argued that access to first contract arbitration should be granted upon application by the trade union.

The MOL's Discussion Paper of November 1991, argued that a 30 day period was a necessary deterrent "for either party seeking to avoid the requirement to bargain". The implicit assumption is that it is in the interest of both parties -- being relatively equal and acceptant of each other as legitimate -- to reach a settlement. As the OFL stated in its response to the MOL's Discussion Paper -- **we question this assumption.** What if one of the parties does not perceive it to be in their interest to settle? What if the parties are not equal and the stronger one would prefer to force the other into a strike in hopes of breaking it?

The bargaining relationship which follows immediately upon certification is, by far, the most fragile. The preferred option goes only part of the way towards ensuring that the parties reach a fair settlement. The prospect of even a month long strike by employees seeking to improve their working conditions and living standards by exercising their democratic right to

unionize, is not one that facilitates organizing or improves the labour relations climate in Ontario.

## 6. IMPROVING COLLECTIVE BARGAINING AND REDUCING INDUSTRIAL CONFLICT

a) Use of Scabs -- This is surely the most controversial section of the proposed amendments. The use of scabs and possible prohibitions against this practice has been the subject of considerable debate since the introduction of anti-scab legislation in Quebec. Now the government's proposals move significantly in the direction of the Quebec legislation. Sections 73.1 and 73.2 constitute far reaching restrictions on an employer's ability to have bargaining unit work performed during a strike.

Such restrictions will only apply during a lawful strike or lockout. This must be authorized by a strike vote in which "at least 60 percent of those voting authorized the strike" (Section 73.1(2)).

Section 73.1(4) proceeds to prohibit an employer from using the "service of an employee in the bargaining unit that is on strike or locked out". Strike breaking by bargaining unit members is now completely prohibited. Section 73.1(5) forbids the employer from hiring replacement workers to perform the work of those on strike, after notice to bargain is given or bargaining begins, whichever is earlier. Section 73.1(6) prohibits an employer, after notice to bargain is given or bargaining has begun, whichever is earlier, from transferring workers, supervisors or "other person" from another location into the struck location. Furthermore, an employer cannot "contract-in" employees to conduct bargaining unit work at the struck location (Section 73.1(6)(4). The burden of proof that an employer did not act contrary to these provisions lies with the employer (Section 73.1(9)).

The passing of these amendments should eliminate the emotionally charged and hostile picket-line confrontations of the past. This being said, Bill 40 also contains significant limitations, notably the restrictions on performing bargaining unit work apply **only to the workplace where a strike is occurring.** This means that an employer **can still legally**

**shift bargaining unit work to another geographic location**. An employer is also allowed under the amendments to **contract out** bargaining unit work. Supervisors, outside the bargaining unit, who ordinarily, work at the struck location, can perform the work normally done by striking employees.

Regrettably, a significant change between the MOL's Discussion Paper of November 1991 and Bill 40 is that **non-bargaining unit employees who normally work at a struck location will be able to perform the work of striking employees.** This represents a **retreat** from the position advocated in the MOL's Discussion Paper and a setback for those of us struggling to maintain and improve the living standards of working people. In addition, these amendments do not provide the same protection as the Quebec's fifteen year old anti-scab provison. Admittedly, these employees have the right to refuse such work but, even here, the employer is not required to advise such employees of their rights.

The government has provided several justifications for its amendments. In a "Fact Sheet" released with the proposals,

one of the rationales held that "strikes will be shortened thus helping Ontario succeed in the new global economy". The Ontario Federation of Labour is convinced that **this will not be the case as long as such gaping loopholes exist in the amendments**. As long as employers can relocate, contract out or use non-bargaining unit employees (along with supervisors) to do bargaining unit work, the duration of strikes will not be appreciably shortened. We remain **resolutely opposed to these serious omissions in the amendments.**

Exceptions

Section 73.2 outlines the types of work that are exempted from the prohibitions on scab workers. Under the specified conditions, the employer is allowed to engage "specified replacement workers..... to perform the work of employees in the bargaining unit that is on strike" in the following essential services:

1. Types of legal custody and detention.

2. Residential care for persons with behaviourial or emotional problems or with a mental, physical or developmental handicap.

3. Residential care for children in need of protection as specified in Subsection 37(2) of the Child and Family Services Act.

4. Services provided to specified persons who need assistance to live outside a residential care facility.

5. Emergency shelter or crisis intervention services to specified persons and to victims of violence.

6. Emergency dispatch communication services, ambulance services or a first aid clinic or station.

In addition, "specified replacement workers" may also be hired by an employer to the extent necessary to prevent:

i) danger to life, health or safety;

ii) the destruction or serious deterioration of machinery, equipment or premises;

iii) serious environmental damage (Section 73.2(3))

Unless there is an "emergency" or "circumstance which could not reasonably have been foreseen", an employer who wishes to use replacement workers for any of the above noted purposes "shall notify the trade union as soon as possible". The employer must provide particulars as to the type of work to be performed and the desired number of workers to be employed before the work commences. The union has the option of agreeing to bargaining unit employees performing all or some of the proposed work instead of specified replacement workers. The employer may employ replacement workers only where the union opposes having striking employees do the work.

In an "emergency", the amendments provide that the employer can hire replacement workers **without consulting the union**, but the employer is required to inform the union as soon as possible. The union can then insist that the employer use striking bargaining unit workers to perform the emergency

work. The Board is granted the power to determine whether the circumstances described exist, to modify actions taken (Section 73.2(11) and (12)) and to expedite proceedings into alleged violations of these sections (Section 104(4)).

A serious concern here is the interpretation to be given such things as "danger to life, health or safety" through to "serious environmental damage". Specifically, what constitutes a danger to health or "serious environmental damage"? How is such to be interpreted by the Board? If this is left unspecified, a broad definition could have sweeping consequences unintended by the Legislature and unacceptable to all parties concerned. We urge the committee to recommend that the Board be given clear, specific direction in this matter.

Overall, the amendments, particularly as strengthened as we propose, will assist the parties in focusing their attention and efforts on the real issues before them. By eliminating disputes regarding scab labour, the law will facilitate the work of the parties in concluding a collective agreement expeditiously.

The government's amendments do not mean that unions strength will be improved. It will depend in large measure on the extent to which production can continue with supervisors and other employees outside the bargaining unit who normally work at the struck location. It will depend on whether or not the employer is successful in continuing production at a different location or in contracting out work.

The Board's interpretation of Section 73.3(3) which enables the employer to use replacement workers, or striking workers with union consent, in order to prevent danger to people, the workplace or the environment, will be of crucial importance. This section does **not** allow employees to continue operation for purposes of production, although some employers will, no doubt, attempt to justify continued operation on this basis.

Several changes could be made to these amendments. The first concerns the potential for **delay in receiving a decision from the Board** where the employer is not complying with the proposed amendments. The Board is not required to expedite its hearings on such issues. The government should move to ensure that the Board has strict time limits within which to

make its rulings. The potential for delay would be greatly reduced if the amendment **required** the Board to rule in an expedited manner.

The second concerns the interpretation to be given to such provisions as "danger to life, health or safety" or "serious environmental damage". As suggested, clear direction needs to be given otherwise far more sweeping interpretations than intended could be imposed.

b) Right to Return to Work -- The Ontario Federation of Labour supports the new statutory provision (Section 75) concerning a back-to-work protocol which parallels that of other provinces such as Manitoba and Quebec. This amendment will apply whenever the union and the employer cannot agree on the terms for reinstating striking employees at the termination of a lawful strike or lockout. Where there is no agreement on reinstatement, the employer is now obliged -- **"shall reinstate"** -- the striking or locked out employee to the position held before the strike unless there is "not sufficient work".

Where work is insufficient, employees must be recalled in accordance with their collective agreement's recall provisions. Where these do not exist, the recall must be in accordance with "each employee's length of service". Striking employees are explicitly "entitled to displace" non-bargaining unit replacement workers.

This amendment will have a positive impact on those few lengthy strikes where employees and their union have little bargaining power left.

c) Employee Benefits Continuation -- Section 81.1 requires employers to continue paying employment benefits, other than pension benefits, when a strike or lockout commences, provided the union tenders payments "sufficient to continue the employee's entitlement to the benefits .....". The employer is prohibited from denying or threatening to deny such continued benefit coverage.

This benefit continuation amendment parallels that of other jurisdictions, such as Alberta, Newfoundland and Manitoba, as

well as becoming the norm in most Ontario labour disputes.

d) Definition of a Strike -- The government has seen fit **not** to include a new and more precise definition of what constitutes a strike. In our view, this is a serious omission. The MOL's own Discussion Paper (November 1991) admits that, under the current law, any actions undertaken in concert by two or more employees, such as a work slowdown, regardless of whether the parties have negotiated the right to engage in that activity, may be treated as a strike. In other words, **any** withdrawal of services by workers is deemed to be a strike, while a lockout only consists of those reductions in services by employers that are intended to compel workers to accept different conditions of employment. The two provisions are far from being equal.

The Ontario Federation of Labour does not consider it in the "public" interest that this inequity continues. Other jurisdictions across Canada have moved to loosen the current statutory restrictions on strikes during the term of a collective agreement and we ask this government to do likewise.

Furthermore, the government has not even seen fit to pursue its proposal, contained in the Discussion Paper (November 1991), that the Board should not be able to rule against employees for refusing to cross picket lines "where an employer and a trade union specifically agree to a provision in their collective agreement allowing employees to refuse to cross a lawful picket line or refuse to handle struck work" (p.38).

As the amendment stands, an employer is permitted to transfer work to other locations (Section 73.1), but workers are not allowed to extend the "right to refuse" to workers at another location. Nor are workers involved in a labour dispute able to set up picket lines at another company whose commercial relations enable their employer to withstand legal employee actions. We urge the government to reconsider these provisions so that workers have the right to honour hot goods declarations and picket lines.

## 7. THE GRIEVANCE ARBITRATION PROCESS

a) Deemed Arbitration Clause, Settlement Officers and Time Limits -- In Section 45(2) of the proposed amendments, the deemed arbitration clause is changed from a tripartite panel to a single arbitrator. This is a model clause providing for binding arbitration. It takes effect where a collective agreement does not contain an arbitration clause. If the parties still prefer an arbitration board, they are free to negotiate such.

The amendments allow for the Minister to appoint, at the request and agreement of the parties, a settlement officer prior to arbitration.

Importantly, the amendments try for the first time to deal with the frustrating delays of the existing procedure by establishing strict time limits. In the case of a single arbitrator, a decision "shall" be rendered within 30 days after the completion of hearings. In the case of a tripartite panel, the "board shall give a decision within sixty days after hearings" (Section 45(6.1). These time limits can be extended on the consent of

the parties which is reasonable, but they can also be extended for reasons specified by the arbitrator or board in the award. Such time limits would also not apply if the single arbitrator or arbitration board renders an oral decision at the conclusion of the hearings. Section 45(7) specifies the Minister's powers of enforcement to ensure that decisions or reasons are provided without delay.

b) Just Cause -- We welcome the expansion of the just cause test in the amendments of Bill 40 to protect employees after certification and during lawful strikes. The language to be added to Section 43.1(3) of the Act, whereby just cause will "continue in effect from the day on which it becomes lawful for the employees to strike .... until a new or renewed collective agreement is in operation ...." substantially improves the protection of employees. We remain concerned, however, that the amendments do not also include a similar test for discharges during an organizing campaign.

c) Jurisdiction and Procedure -- The proposed amendments expand the role and jurisprudence of an arbitrator or arbitration board's jurisdiction and procedural authority.

In terms of jurisdiction, an arbitrator or tripartite panel has the power to determine:

-- "the nature of the differences in order to address their real substance;"
-- "all questions of fact or law that arise;"
-- "interpret and apply the requirements of human rights and other employment-related statutes;"
-- "grant such interim relief" as considered appropriate;
-- "enforce a written settlement of a grievance".

In terms of procedure, the proposed amendments would allow the arbitrator or board of arbitrators to require:

-- Any party to furnish particulars and documents before or during a hearing;
-- Enter any premises and inspect any work, material, machinery or article at the premises and interrogate any person about any of the differences between the parties;
-- Make such orders or give such directions in proceedings considered appropriate to expedite the

proceedings or to prevent the abuse of the arbitration process;

-- Mediate the differences between the parties at any stage of the process.

The amendments contain further provisions and introduce a new mediation-arbitration procedure upon the consent of both parties.

The statutory expansion of an arbitrator or an arbitration board's jurisdictional power to include all employment related statutes, such as human rights and other employment laws, may allow the pursuit of such even where the collective agreement does not contain provisions on these issues.

The amended procedural powers, the provision for the appointment prior to arbitration of a settlement officer, and the creation of a consensual mediation-arbitration procedure are all designed to alleviate the delays and costs of the arbitration process and meet with our support.

d) Administration -- We look forward to actively participating in the new administrative structures which will improve the arbitration systems and reduce the costs of arbitration. The Ontario Federation of Labour is not convinced that voluntary restraint by arbitrators will prove successful. We therefore urge that the power of the Minister to control the renumeration and expenses of an arbitrator or board should be extended (Section 45(7)).

## 8. PRESERVATION OF BARGAINING RIGHTS

a) Successor Rights -- Sale of a Business -- Bill 40's amendments to the Act (Section 64) concerning successor rights on the sale of a business represent a welcome improvement. A successor employer will now be obliged to take the place of the former employer in relation to the trade union in an expanded number of situations, including:

1. A proceeding before the Board under any Act.
2. A proceeding before another person or body under this Act or the Hospital Labour Disputes Arbitration Act.

3. A proceeding before the Board or another person or body pertaining to the collective agreement (Section 64(2.1)).

These amendments are designed to ensure that bargaining rights and obligations are not delayed or avoided by the sale of a business by making the successor employer replace the former employer to the extent possible. Under the current provisions, problems have arisen as the parties have had to return to the beginning of the collective bargaining process if the business is sold during negotiations. This has led to both a costly duplication of efforts, as well as frustrating delays for union members. With these amendments, the successor employer will adhere to statutory obligations and the grievance provisions of the pre-existing collective agreement and any terms of settlement already negotiated.

Throughout the process of a new employer taking over a pre-existing business, the Board has considerable powers. This includes the power to direct the intermingling of employees of the newly acquired business with the employees from the

business the employer previously owned affecting issues such as seniority rights.

What is still missing from these provisions is the inclusion of the **Sale of Assets** in the sale of a business. Many unions, as well as the Ontario Federation of Labour, raised this issue in their submission on the MOL's Discussion Paper of November 1991.

The concern of the Ontario Federation of Labour is that the definition of sale contained in the Act, as currently written, may not extend to circumstances where there has only been a sale of assets. This may occur even where the purchaser proceeds to engage in similar business activities on the same premises. It is for this reason that the Report of the Labour Representatives to the Labour Law Reform Committee suggested a moderate extension of the existing provisions "to include a significant sale of assets to an employer where employees are engaged in types of or similar work at the same premises the vendor of the assets conducted its business."

The amendments, again similar to the MOL's Discussion Paper of November 1991, also **fails to provide adequate protection to employees in circumstances of plant relocation.** A trade union's bargaining rights and the rights of employees which have accrued under a collective agreement should not, in our view, expire because an employer decides for business reasons to relocate to a new location in Ontario. A legislative amendment is necessary to ensure that employees' collective bargaining rights are maintained, including their wage levels, benefits, and job security, when an employer relocates his business.

b) Federal to Provincial Sale -- Under these amendments, Section 64.1 of the Act will extend the successor rights protections so that they will apply to the sale of a business covered by the Canada Labour Code but which, following the sale, is covered by Ontario's labour law. This parallels the successor rights (crown transfers) which already exist when an enterprise is transferred from the Ontario Labour Relations Act to the Crown Employees Collective Bargaining Act (CECBA) or from the public service to the Ontario Labour Relations Act.

The labour movement has long advocated such amendments as they ensure that employees will not lose their bargaining rights and collective agreement over sales of businesses and transfers of legislative jurisdictions.

c) Contracting-In and Contract Tendering in the Contract Service Sector -- Bill 40 amends Section 64.2 of the Act to further extend successor rights such that they apply to situations of "contracting-in" in the contract service sector. Complementary amendments are made in the Employment Standards Act. These new provisions will pertain to "services" that are provided by a building owner or manager, such as building cleaning services, food services or security services. They do not apply to construction maintenance or production.

The amendments deem that a sale of business has occurred if employees are performing services for their employer at their place of business and the employer ceases to provide such services and, subsequently, essentially the same services are provided by a new employer. By broadening the definition of a sale of business, the proposals will preserve the

bargaining rights and collective agreements held with the first employer and apply them to the successor employer.

These amendments go a long way towards rectifying the widespread problems in the contract service sector under the current legislation. The effect has been a lack of job security and poor levels of compensation and benefits. Bargaining rights fought for, and even obtained, are often as temporary as employment itself. The rate of unionization for building cleaners and cafeteria workers therefore has, not surprisingly, been very low. These provisions will help alleviate this situation. They also enable an employee who accepts a position with the successor employer to be credited with their past service with the previous employer (Section 56.7). Where the amendments fall short is in their failure to apply to the contracting-in of maintenance, construction and production operations, and to the contracting **out** of work. The entirety of Section 64 protection to employees should also apply to this amendment. The purchaser should not be immune from the actions of the vendor in unfair labour practice situations or from applicable arbitration statutes.

## 9. ADJUSTMENT AND CHANGE IN THE WORKPLACE

There are some limited steps forward in this area but, on the whole, the amendments on plant closures and adjustments do not yet adequately meet the needs of employees -- particularly those confronted with a layoff.

Part I of Bill 40 authorizes the establishment of an advisory service to provide assistance to employers, trade unions and employees in responding to changes in technology, the economy and the workforce. The mandate of this service is directed to four areas -- expert advice, mediation services, brokerage and information services.

The amendments provide that a new section (41.1(1)) be added to the Act which would require the employer in the case of closure or mass layoff, to "bargain in good faith and make every reasonable effort to negotiate an adjustment plan". The adjustment plan itself is permissive, not obligatory. In Section 41.1(5) concerning the content of adjustment plans, it states that such a plan "**may** include provisions respecting any of the following" (emphasis added):

1. "Consideration of alternatives to terminating the employee's employment"

2. "Human resource planning and employee counselling and retraining"
3. "Notice of termination"
4. "Severance pay and termination pay"
5. "Entitlement to pension and other benefits"
6. "A bipartite process for overseeing the implementation of the adjustment plan"

If an adjustment plan is concluded, it is enforceable as if it were a part of a collective agreement, but the point is that the amendments **do not require** that an adjustment contain the content indicated in the provisions noted above, or even that an adjustment plan be concluded. The amendments are inadequate in that they focus entirely on process rather than content. The parties are only required to **intend** to reach an agreement and to make reasonable efforts to that end. Thus the Board will be more concerned with the manner in which negotiations are conducted than with their content. The Board will not have the authority to impose an adjustment plan, nor will workers have the right to strike over the plan. At the very least, the prohibition on the Board imposing a plan where the duty to bargain has been breeched should be removed (Section 91(4.1)).

With 317,000 full-time jobs lost in Ontario between March 1989 and March 1992, and a continuing recession, it is our view that the proposed amendments are inadequate.

The amendments also propose the addition of Section 44.1 which stipulates that "a collective agreement must contain a consultation provision if a party makes a written request for one ....". This provision "must provide that the parties consult regularly during the term of the agreement about issues relating to the workplace ....". If the collective agreement does not contain such a provision, model language is provided and deemed to be in the agreement.

This amendment will ensure that employers consult with unions on workplace issues where this does not already occur. While the committees are to meet every two months and may encourage greater dialogue, it remains to be seen whether anything substantive will occur in this forum on issues such as technological change. Alternatively, such committees could have been a part of both an ongoing duty to bargain in good faith over various important issues during the life of a collective agreement and to negotiating labour adjustment issues -- such as a closure agreement -- if such was made mandatory.

## CONCLUSION

The Government of Ontario is to be commended both for initiating a full consultation process enabling all views to be heard and for proposing significant amendments on labour law reform. Bill 40 represents a far-reaching and progressive package of provisions which will help working people in Ontario advance fairness and equity in the workplace.

At the same time, we have tried to point out a number of areas where the government's proposals are, in our view, either incomplete, such as the remaining space for petitions, or seriously inadequate, such as the gaping loopholes in the anti-scab provisions.

A variety of technical points and issues have been raised, dropped or modified during the consultation period that preceded Bill 40. This is to be expected in any democratic process. We have made our case on the most important of these. But there is one issue which could help extend fairness and equity, through unionization, to those who need it most and yet has eluded full discussion -- not to mention concerted action. This is the issue of **broader-based bargaining.**

While not referred to in Bill 40, this issue is directly linked to labour law reform and has been discussed in conjunction with amendments to the Act. The government has recognized that the right to organize must be equally accessible to all workers and, in particular, to women, minorities and other low-paid workers. Indeed, the MOL's Discussion Paper (November 1991) states that: "Legal technicalities, resistance to attempts by employees to organize, and the outdated assumptions enshrined in current law have combined to deny access to collective bargaining to large groups of employees who may otherwise wish to organize" (page 1).

At the same time, the Ministry of Labour's own assessment of the economic impact of the proposed reforms found that the options which were designed to facilitate organizing would most likely result in only a **slight to moderate increase in the rate of unionization** (Ontario, MOL,1991). Given the current pace of economic restructuring, the high levels of unemployment and the simultaneous growth of the small workplace and private service sectors, we can only concur with this assessment.

Yet the government, to date has steadfastly refused to launch a major study of those broader-based bargaining structures which may well prove more applicable to today's economy, where the core of the workforce is no longer employed in large manufacturing plants. The current Act, which was based

on the Wagner Act model, with its separate plant by plant (or office by office) organizing, negotiations and distinct collective agreements, was designed in the 1930's for large manufacturing enterprises. It was not designed for small workplaces or the service sector, where approximately seven out of ten Ontarians are currently employed. These employees are overwhelmingly unrepresented by a union, have significantly lower levels of compensation than unionized employees and their job security is often highly tenuous. This is also where most women, visible minorities and youth are employed.

Broader-based bargaining structures, by which we basically mean structures of worker and employer representation for purposes of collective bargaining beyond the level of the workplace, i.e., on a sectoral or regional level, hold out the potential of extending unionization -- and therefore some economic justic -- to those most vulnerable in the economy. It is for purposes of enabling the two thirds of the workforce, particularly those in the small workplaces and the service sector, to exercise their democratic right to organize in order to improve their economic circumstances and life chances, that the Ontario Federation of Labour and its affiliated unions **support a full-scale study into broader-based bargaining**.

We, therefore, ask again that the government consider our request. A major credible study into the applicability and viability of broader-based bargaining structures for the growing number of employees in the small workplace and service sectors could well complement the study already considered by the Ministry of Labour on bargaining structures for domestics and homeworkers in the garment industry. Since a study of this scale will take some considerable time before it is able to bring forth its recommendations, it should be launched immediately.

In conclusion, we would like to take this opportunity to thank the Resources Development Committee for taking the time to hear our views. We trust that our concerns will receive serious consideration in the final writing of this legislation which is so very important to our members and the people of Ontario. Together with the quick passage of other important legislation, such as pay equity and employment equity, we are confident that Ontario will prove to be a better place for everyone to work and live.

RESPECTFULLY SUBMITTED BY

THE ONTARIO FEDERATION OF LABOUR

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